

Chapter X

HEARINGS: MEDICAL QUALITY HEARING PANEL

A. Overview of Function and Updated Data

Housed within the Department of General Services, the Office of Administrative Hearings (OAH) is a centralized panel of administrative law judges (ALJs) who preside over adjudicative hearings in a variety of areas for over 150 state and 800 local agencies. OAH is headed by a director (also called the chief administrative law judge) appointed by the Governor. Currently, the Office employs the director, five presiding judges, and approximately 50 ALJs based in four California cities (Sacramento, Oakland, Los Angeles, and San Diego).¹⁸³

In the early 1990s, the Legislature enacted Government Code section 11371 *et seq.*, which created a special panel of ALJs — the Medical Quality Hearing Panel (MQHP) — within OAH.¹⁸⁴ MQHP ALJs specialize in physician discipline matters; the statute limits the number of ALJs who may be appointed to the MQHP by the OAH director,¹⁸⁵ and generally requires an MQHP ALJ to preside over MBC adjudicative hearings.¹⁸⁶ The purpose of the creation of the MQHP is to enhance the expertise and independence of the ALJs who preside over physician discipline hearings. The statute declares that the MQHP ALJs “shall have medical training as recommended by the Division

¹⁸³ In the *Initial Report*, we reported that OAH employed approximately 35 ALJs throughout the state. Effective July 1, 2005, OAH entered into an agreement with the Department of Education which requires OAH ALJs to preside over special education hearings for the Department. As a result of this additional responsibility, OAH is in the process of doubling in size. OAH’s Special Education Unit alone will eventually include three presiding ALJs, 40 line ALJs, and will require the Office to add two more hearing facilities in southern California and an additional hearing facility in Sacramento.

¹⁸⁴ The MQHP was originally created in SB 2375 (Presley) (Chapter 1597, Statutes of 1990); its composition was refined in SB 916 (Presley) (Chapter 1267, Statutes of 1993). See *Initial Report*, *supra* note 13, at 30, 36, 179.

¹⁸⁵ Gov’t Code § 11371(a)-(b). These sections provide that the OAH director must appoint at least five full-time ALJs but not more than 25% of the total number of ALJs in OAH to the MQHP. Currently, 13 full-time ALJs serve on the MQHP.

¹⁸⁶ *Id.* § 11372.

of Medical Quality . . . and approved by the Director of the Office of Administrative Hearings.”¹⁸⁷ Additionally, the statute requires the OAH director, with the advice of MBC, to appoint “panels of experts” to provide assistance to ALJs who may have difficulty with the expert witnesses paid by the parties. “These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross-examination by all parties.”¹⁸⁸ With the creation of the specialized ALJ panel, the Legislature — for the first time — felt comfortable authorizing those judges to entertain motions for and issue interim suspension orders restricting or suspending the license of a physician pending the conclusion of the disciplinary matter, as an alternative to the temporary restraining order remedy in superior court.¹⁸⁹

Once an accusation has been filed by MBC and the respondent files a notice of defense, the parties approach OAH for a hearing date.¹⁹⁰ Effective July 1, 2004, OAH adopted a new policy requiring it to calendar hearings to start within 90 days of the date both parties are available; in no event will the first day of the hearing be scheduled more than 210 days from the date OAH receives the request for hearing.¹⁹¹ Prior to the evidentiary hearing, the assigned ALJ may entertain and rule on discovery disputes¹⁹² and hold prehearing conferences to clarify issues, make rulings on witnesses and objections to proffers of evidence, establish the order of presentation of evidence and witnesses, require the exchange of witness lists and exhibits or documents to be offered in evidence at the hearing, and explore the possibility of settlement.¹⁹³ OAH may also conduct formal settlement conferences prior to the hearing in an effort to avoid litigation.¹⁹⁴

¹⁸⁷ *Id.* § 11371(a).

¹⁸⁸ *Id.* § 11371(d).

¹⁸⁹ *Id.* §§ 11372(b), 11529.

¹⁹⁰ OAH usually conducts an immediate telephonic trial-setting conference with the parties in order to schedule a hearing date, and the hearing is usually preceded by one or two scheduled settlement conferences.

¹⁹¹ OAH’s July 1, 2004 policy replaced a prior policy requiring it to calendar hearings to start within 120 days of the date that both parties are available; there was no outer limit.

¹⁹² *See* Gov’t Code § 11507.7.

¹⁹³ *See id.* § 11511.5.

¹⁹⁴ *See id.* § 11511.7. The ALJ who is assigned to the matter may not conduct the settlement conference unless the parties so stipulate.

Evidentiary hearings on accusations filed by MBC are presided over by an MQHP ALJ. During the hearing, each party has the right to examine and cross-examine witnesses, present documentary evidence, and present oral argument.¹⁹⁵ Following submission of the evidence, the ALJ prepares a written decision including findings of fact, conclusions of law, and recommended discipline.¹⁹⁶ The ALJ's ruling is a "proposed decision"¹⁹⁷ which is forwarded to the Division of Medical Quality (DMQ), which makes the final agency decision (see Chapter XI).

In recommending discipline, the MQHP ALJ is guided by a set of "disciplinary guidelines" approved by DMQ; these guidelines set forth the Division's preferred range of sanctions for every given violation of the Medical Practice Act and the Board's regulations.¹⁹⁸

Exhibit IX-A above reflects the "throughput" of MBC investigations into HQE, and HQE accusations into OAH. In the past six years, HQE has filed an annual average of 264 accusations and 23 petitions to revoke probation. Due to the large number of post-filing settlements (many of which are assisted through settlement conferences conducted by OAH ALJs), the MQHP has presided over an average of 45 MBC disciplinary hearings annually for the past six years. Government Code section 11517(c)(1) requires ALJs to submit a proposed decision to DMQ within 30 days of submission of all the evidence. Exhibit X-A below indicates that, over the past four years, it took MQHP ALJs an average of 34 days to submit proposed decisions. In 2004–05, OAH improved on its 2003–04 record by lowering its average to 31 days.

Ex. X-A. HQE/OAH/DMQ Average Cycle Times

	Activity	FY 2001–02	FY 2002–03	FY 2003–04	FY 2004–05
HQE	MBC transmittal → HQE filing of accusation	103 days	91 days	107 days	116 days
HQE/ OAH	Estimated time from filing of accusation → conclusion of hearing/ submission of stipulation ¹⁹⁹	351 days	379 days	448 days	382 days
OAH	Case submission to ALJ → submission of proposed decision to DMQ	35 days	36 days	35 days	31 days
DMQ	Receipt of proposed decision → DMQ final decision	51 days	56 days	30 days	60 days

Source: Medical Board of California

¹⁹⁵ *Id.* § 11513.

¹⁹⁶ *Id.* § 11425.50.

¹⁹⁷ *Id.* § 11517.

¹⁹⁸ Effective July 1, 1997, Government Code section 11425.50 requires occupational licensing boards to codify their disciplinary guidelines in their regulations. MBC has adopted section 1361, Title 16 of the California Code of Regulations, which incorporates by reference the 2003 version of the Board's disciplinary guidelines.

¹⁹⁹ We generated this estimated figure by subtracting average ALJ proposed decision drafting time (presented above) and average DMQ decision time (presented above) from the *MBC Annual Report's* calculation of the average length of time from accusation filing to final case disposition.

B. The Monitor's Findings and MBC/Legislative Responses

In the *Initial Report*, the Monitor made no findings regarding OAH's performance. However, the Monitor promised to look into the following issues.

1. OAH was impacted by the hiring freeze and budget cuts.

In the *Initial Report*, the Monitor noted that OAH was not immune from the October 2001 hiring freeze or the subsequent position "sweeps" and budget cuts. OAH lost two ALJ positions and a number of support staff positions. Although these losses affected OAH as a whole, they did not directly impact the MQHP which provides services to MBC. The MQHP remains staffed with 13 line ALJs, which appears sufficient to handle MBC's workload.

2. The time it takes to schedule and conduct evidentiary hearings is lengthy.

Exhibit X-A above indicates an estimated average 382-day period between the filing of the accusation and the conclusion of the evidentiary hearing during 2004–05 — down from 448 days in 2003–04, but still almost 13 months. As we explained in the *Initial Report*, some of these hearings are one- or two-day matters; others should last days or weeks but — due to the schedules of the attorneys, respondent, and judge — must be conducted in many non-contiguous blocks over the course of many months. Based on a limited review, it seems that the delay in scheduling and conducting MBC hearings is not due to a shortage of judges or bureaucratic limitations on OAH's part. Instead, it appears that the understaffing in HQE's Los Angeles office (which normally files approximately 60% of all accusations in California) and the limited number of defense counsel who regularly defend physicians in MBC disciplinary matters account for much of the delay in scheduling and holding hearings. In short, there are too few attorneys on both the prosecution and defense sides, and all of these attorneys are "booked" many months in advance. OAH believes that it is setting hearings well within the timelines established in its July 1, 2004 policy, but is forced to postpone scheduled hearings because the parties request continuances. In OAH's view, it has sufficient MQHP ALJs to hear cases more rapidly than they are being heard — but they can't, due to a shortage of attorneys in HQE and the limited number of defense attorneys who handle MBC cases.

3. DMQ members perceive that MQHP ALJs are not following MBC disciplinary guidelines.

Exhibit XI-A below indicates that, during 2001–02 and 2002–03, DMQ nonadopted an unusually high number of proposed ALJ decisions: 25% in 2001–02 and 28% in 2002–03. However, the nonadoption rate declined to 16% in 2003–04, and further decreased to only 11% in 2004–05.

According to the OAH director, DMQ nonadopts a larger percentage of proposed decisions than do other agencies, which generally nonadopt approximately 5% of proposed decisions. The reasons for this higher nonadoption rate are unclear, and cannot be determined or even intelligently speculated within the context of a Monitor project funded at this level and charged with reviewing the entirety of MBC's enforcement and diversion programs. Further, the Monitor — despite the broad investigative authority delegated in Business and Professions Code section 2220.1 — is not privy to DMQ's closed-door sessions following oral arguments on nonadoptions, such that the Monitor has no way of knowing DMQ members' thought processes on individual cases. Although DMQ members have at times voiced concerns that ALJs do not follow the Board's disciplinary guidelines when recommending discipline in physician cases, it is clear that DMQ agrees with the ALJs' proposed decisions in the vast majority of cases.

4. Whether ALJs are receiving medical training as authorized by Government Code section 11371 is unclear.

As noted above, one of the ways in which SB 2375 (Presley) and SB 916 (Presley) sought to enhance the expertise of MQHP ALJs was to provide them with medical training “as recommended by the Division of Medical Quality . . . and approved by the Director of the Office of Administrative Hearings.”²⁰⁰

According to the OAH director, MQHP ALJs receive medical training in a variety of ways. For example, in November 2004, the director convened a three-day annual statewide training session for OAH ALJs, and more than one-third of it related to medical issues (including participation and presentations by Medical Board staff). In addition, every month, every OAH office has a staff meeting which often includes a training component; some of those training components relate to Medical Board issues. Finally, MBC staff has visited all four OAH offices in the past year to engage in half-day training sessions with MQHP ALJs. While MBC staff members are prohibited from addressing issues raised in specific or ongoing cases, they provide valuable information on a list of topics of interest to MQHP ALJs.

5. ALJs rarely make use of their authority to call their own expert witnesses.

Another way in which SB 2375 (Presley) sought to enhance both the expertise and independence of the MQHP ALJs was to provide them with a panel of expert witnesses. If confronted with diametrically opposed expert witnesses paid by the parties, this mechanism enables the ALJ to call his/her own expert to the stand “to testify on the record about any matter relevant to

²⁰⁰ Gov't Code § 11371(a).

a proceeding and subject to cross-examination by all parties.”²⁰¹ According to the OAH director, this procedure is rarely used, primarily because the judges depend on the parties to produce relevant expert testimony and generally feel comfortable relying on it. Further, if the judge were to select his/her own expert, the use of that expert would delay the proceeding by several additional months (as noted in Chapter VIII, the average period required for an expert to review medical records and draft an expert opinion is 69 days). For these reasons, this mechanism is seldom used.

6. Should ALJs be authorized to enforce administrative subpoenas?

As noted throughout the *Initial Report*, medical records procurement and MBC/HQE’s tolerance of lengthy delays by physicians in producing requested medical records are serious issues confronting MBC and HQE. One time-consuming aspect of the existing process is that subpoena enforcement is available only in superior court. In the *Initial Report*, the Monitor suggested that some thought be given to authorizing MQHP ALJs to enforce subpoenas issued by MBC, as a means of expediting medical records procurement. On this issue, the OAH director offered several comments: (1) the Legislature would have to specifically authorize OAH to enforce subpoenas, as OAH has no such authority currently; (2) if the Legislature authorizes OAH to enforce subpoenas, it should also authorize judges to impose a penalty for noncompliance, such as a fine or evidentiary sanctions; (3) it is unclear how many subpoena enforcement motions would be filed and whether OAH is sufficiently staffed to handle them; and (4) from a bureaucratic standpoint, it is also unclear to whom, and under which case number, OAH would bill the time its judges spend hearing and ruling on these motions — as, by definition, no accusation has yet been filed and OAH has no existing case number for the matter.

Hopefully, MBC’s new medical records policy and SB 231’s expansion of the citation and fine sanction to noncompliance with lawful requests for records — described in Chapters IV and VII — will substantially shorten the timeframe for medical records procurement and obviate the need for subpoena enforcement proceedings by either superior courts or OAH ALJs.

7. The venue statute governing the location of adjudicative hearings results in substantial and unnecessary costs for HQE, OAH, MBC, and — ultimately — the physician population generally.

In the *Initial Report*, the Monitor examined Government Code section 11508, which governs the venue for adjudicative hearings under the Administrative Procedure Act — including MBC hearings presided over by an OAH ALJ. The Monitor found that the antiquated statute permitted

²⁰¹ *Id.* § 11371(d).

hearings to be held anywhere in the state, frequently causing HQE, OAH, and/or respondent's counsel to suffer significant costs and inconvenience, and leaving established OAH hearing facilities empty and unused. In Recommendation #39, the Monitor suggested that section 11508 be amended to require most hearings to be held in large cities in which both HQE and OAH have offices and hearing facilities.²⁰²

As described in Chapters IV and IX above, section 22 of SB 231 amends Government Code section 11508 to require Medical Board administrative hearings to be held at the OAH hearing facility that is closest to the location where the transaction occurred or the respondent physician resides. The amendments to section 11508 preserve the ability of the parties to agree to a different venue; they also preserve the ability of the respondent to move for a change of venue and the discretion of the ALJ to order a change of venue. However, unless good cause is identified in writing by the ALJ, the hearing must be held in a facility maintained by OAH. Thus, SB 231 imposes a presumption that most MBC adjudicative hearings will be held at secure OAH facilities.

²⁰² *Initial Report*, *supra* note 13, at 175–77.

